85-540 (1)

Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, ex rel.
JAMES D. COLE, SR., and JAMES D. COLE, JR.,
Petitioners,

vs.

STEVEN McEVERS, WARDEN, Lincoln [Illinois]
Correctional Center,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Where petitioners, indicted for solicitation to commit murder of an individual by *requesting* another to commit that offense, and in a separate count, for solicitation to commit murder of the same individual by *encouraging* the same other party to commit that offense,* were acquitted of solicitation by requesting, and a mistrial was declared as to solicitation by encouraging, upon the jury's failure to agree: Does the federal constitutional prohibition against double jeopardy—a component of due process of law—invalidate their subsequent convictions upon retrial for solicitation by encouraging, upon identical facts as were presented at their first trial?

2. Is the Seventh Circuit's decision—adhering, without independent analysis, to the Illinois Supreme Court's construction of the solicitation statute,† upholding the subsequent conviction—based on an incorrect interpretation and application of this Court's decision in *O'Brien* v. *Skinner*, 414 U.S. 524?

3. Does *O'Brien* v. *Skinner*, 414 U.S. 524, require that the federal habeas court abdicate its responsibility to enforce federal constitutional guarantees to citizens of the United States against infringement by the States, where (as here) it is asserted—and the Illinois Appellate Court

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* The statute provides:
"A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense." Chap. 38, sec. 8-1(a), Ill.Rev.Stat. 1979.

† *People* v. *Cole*, 91 Ill.2d 172, 435 N.E.2d 490, 61 Ill.Dec. 793 (1982).

agreed**—that the statutory construction adopted by the Illinois Supreme Court results in violation of petitioners' federal constitutional guarantee against double jeopardy, and it is further alleged that on the facts, said statutory interpretation is patently unreasonable?

PARTIES INVOLVED [per Rule 21.1(b)]

Petitioners, James D. Cole, Sr. and James D. Cole, Jr., father and son, were defendants in the Circuit Court of Peoria County, Illinois, successful appellants in the Illinois Appellate Court, losing respondents in the Illinois Supreme Court, and petitioners in the United States Supreme Court; in these habeas proceedings, petitioners were petitioners in the District Court for the Central District of Illinois, appellants in the Court of Appeals for the Seventh Circuit, and are now petitioners in this Court. Respondent, Warden McEvers (not a party to the State proceedings) was respondent in the District Court, appellee in the Seventh Circuit, and respondent in this Court in the habeas proceedings. The People of the State of Illinois was plaintiff in the Circuit Court of Peoria County, Illinois, losing appellee in the Illinois Appellate Court, successful petitioner in the Illinois Supreme Court, and respondent in the United States Supreme Court.

** *People* v. *Cole,* 98 Ill.App.3d 309, 424 N.E.2d 393, 53 Ill.Dec. 758 (3 Dist. 1981).

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The decision below—affirming denial of habeas corpus, and thereby upholding petitioners' convictions for solicitation by encouraging, based on adherence to the Illinois Supreme Court's interpretation of the solicitation statute [that solicitation by "request" and solicitation by "encouragement" are separate crimes] —perpetuates the violation of petitioners' federal constitutional right against double jeopardy, where, at a prior trial, on identical evidence, they were acquitted of solicitation by requesting.

The District Court and Court of Appeals both adhered to such construction on the basis of *O'Brien* v. *Skinner*, 414 U.S. 524, which decision neither suggests nor requires that a State court's statutory interpretation be followed by the federal court where such construction is patently unreasonable, and where it is asserted—and the Illinois Appellate Court agreed—that such construction results in violation of petitioners' federal constitutional guarantee against double jeopardy.

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Certiorari should be allowed to clarify the implications of *O'Brien* v. *Skinner,* in order to prevent that decision's further improper use in derogation of citizens' constitutional rights; and to rectify the federal courts' abdication of responsibility independently to examine and analyze claims presented on habeas corpus. 7

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, James D. Cole, Sr. and James D. Cole, Jr. (hereafter, defendants), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the District Court's denial of their petition for a writ of habeas corpus, attacking on double jeopardy grounds, their convictions for solicitation by encouraging to commit murder.

Judgment and Order Below

The Order of the Court of Appeals for the Seventh Circuit, No. 83-3137, unpublished per Circuit Rule 35, is set out as Appendix A.

Jurisdictional Statement

On May 23, 1985, the Court of Appeals for the Seventh Circuit issued its Order herein. (App. A) Defendants' timely Petition for Rehearing and (separate) Petition for Rehearing In Banc were denied on August 5, 1985. (App. B) This petition to review the judgment of a federal court of appeals is timely filed within 60 days after denial of petition for rehearing. Jurisdiction is invoked under 28 U.S.C. 1254(1) and Rules 20.1 and 20.4 of this Court.

Constitutional Provisions and Statute Involved

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Chapter 38, sec. 8-1(a), Ill.Rev.Stat. 1979, provides:

> "A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense."

STATEMENT OF THE CASE

Nature of the Case

Petitioners, James D. Cole, Sr. and James D. Cole, Jr., (hereafter, defendants; and, as necessary, Cole, Sr. and Cole, Jr.), were indicted (No. 80 CF 213) for (Count 1) solicitation to commit the murder of Robert H. Jones by requesting William Haley to commit that offense, (Count 2) solicitation to commit the murder of Jones by encouraging Haley to commit that offense, and (Count 3) conspiring to murder Jones by agreeing with each other and Haley to commit that offense. (C. 3)[1]

The jury found defendants not guilty on Counts 1 and 3, and the court declared a mistrial on Count 2 upon the jury's failure to agree. (C. 93) Defendants' motions for discharge and to dismiss as to Count 2 on double jeopardy grounds were denied[2], and they were again tried on Count 2, resulting in their convictions, and sentenced to five years in custody.

After the Illinois Appellate Court reversed the convictions on double jeopardy grounds, *People* v. *Cole*, 98 Ill App.3d 309, 424 N.E.2d 393, 53 Ill.Dec. 758 (3 Dist. 1981), the Illinois Supreme Court granted the State's petition for leave to appeal, and reversed, affirming the convictions. *People* v. *Cole*, 91 Ill.2d 172, 435 N.E.2d 490, 61 Ill.

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[1] Hereafter: "R." refers to the Record on Appeal in the Seventh Circuit, No. 83-3187; "C." to the Common Law Record in the State appellate proceedings; "Tr. 1" to the Transcript of Proceedings from the first trial, and "Tr. 2" to that from the second trial.

[2] Retrial followed the trial court's denial of defendants' motions for discharge as to Count 2 (C. 95) and to dismiss Count 2 (C. 154) on double jeopardy grounds.

Dec. 793 (1982). This Court denied certiorari. *People* v. *Cole,* 459 U.S. 863, 74 L.Ed.2d 118 (1982).

Defendants filed their petition for a writ of habeas corpus in the District Court, alleging that their retrial upon Count 2 (solicitation by encouraging) following acquittal on Count 1 (solicitation by requesting) upon the same facts, violated the prohibition against double jeopardy. In its Order denying habeas relief, the District Court granted respondent's motion for summary judgment and denied defendants' cross-motion for summary judgment.

Jurisdiction of Trial Court [per Rule 21.1(i)]

Jurisdiction in the court of first instance is based upon 28 U.S.C. 2241 and 2254, granting District Courts power to issue writs of habeas corpus in proceedings attacking the legality of State judgments of conviction on federal constitutional grounds.

Statement of Facts

Defendants were indicted for (Count 1) solicitation to commit the murder of Robert H. Jones by *requesting* William Haley to commit that offense, (Count 2) solicitation to commit the murder of Jones by *encouraging* Haley to commit that offense, and (Count 3) conspiring to murder Jones by agreeing with each other and with Haley to commit that offense. (C. 3) No instructions defining "requesting" or "encouraging" were given. (See p. 12, *infra.*)

The jury found defendants not guilty on Counts 1 and 3, but were unable to reach a verdict on Count 2. (See App. pp. 2-3.) The court declared a mistrial upon Count 2. (C. 93)

After the trial court denied defendants' motions for discharge (C. 95) and to dismiss (C. 154) on double jeo-

pardy grounds as to Count 2, defendants were again tried on Count 2, and were convicted. (C. 202)

The direct testimony of Illinois Division of Criminal Investigation Agent William Haley at each of the two trials was as follows:

On Friday, January 11, 1980, Haley, in an undercover capacity, contracted to kill Robert H. Jones on behalf of defendants. (Tr. 1, p. 85; Tr. 2, p. 146) The previous Tuesday, Haley had met with informant Al Martin who arranged a meeting with Cole, Jr., at his place of business. (Tr. 1, p. 7; Tr. 2, p. 96) Haley met with Cole, Jr. the following noon (Tr. 1, p. 9; Tr. 2, p. 99) and again, for lunch on Friday. (Tr. 1, p. 11; Tr. 2, p. 103) That evening Haley met with both defendants in a parking lot. (Tr. 1, p. 52; Tr. 2, p. 114) He was driven to a residential suburb, and the home of the intended victim was shown to him. (Tr. 1, p. 66; Tr. 2, p. 132) Back at the parking lot, the price of $1,500 was agreed upon. (Tr. 1, p. 71; Tr. 2, p. 137) Haley was paid a $200 deposit. (Tr. 1, p. 66; Tr. 2, p. 132) Defendants were arrested later that night.

Facts Respecting Denial of Habeas Corpus

In denying habeas relief, the District Court determined that it was bound to follow the Illinois Supreme Court's construction of the pertinent statute—that is, that "solicitation by encouragement and solicitation by request do not constitute a single offense," and therefore that defendants' convictions after retrial did not violate the prohibition against double jeopardy.

Affirming, the Court of Appeals for the Seventh Circuit held:

"The District Court correctly concluded that federal courts follow the construction of a State statute adopted by the highest court of the State. As the Supreme Court said in *O'Brien* v. *Skinner,* 414 U.S. 524, 531 (1974), 'It is not our function to construe a state statute contrary to the construction given it by the highest court of a State'. Therefore we accept the ruling of the Illinois Supreme Court that solicitation by request and solicitation by encouragement are separate crimes and may be charged in separate counts of an indictment. . . . [citation omitted] Hence the rule applies that a retrial on the count as to which here was a mistrial does not constitute double jeopardy. *Illinois* v. *Somerville,* 410 U.S. 458, 463 (1973)." (App. A, p. 2a)

REASONS FOR GRANTING THE WRIT

The decision below—affirming denial of habeas corpus, and thereby upholding defendants' convictions for solicitation by encouraging, based on adherence to the Illinois Supreme Court's interpretation of the solicitation statute [that solicitation by "request" and solicitation by "encouragement" are separate crimes]—perpetuates the violation of defendants' federal constitutional right against double jeopardy, where, at a prior trial, on identical evidence, they were acquitted of solicitation by requesting.

The District Court and Court of Appeals both adhered to such construction on the basis of O'Brien v. Skinner, 414 U.S. 524, which decision neither suggests nor requires that a State court's statutory interpretation be followed by the federal court where such construction is patently unreasonable, and where it is asserted—and the Illinois Appellate Court agreed—that such construction results in violation of petitioners' federal constitutional guarantee against double jeopardy.

Certiorari should be allowed to clarify the implications of O'Brien v. Skinner, in order to prevent that decision's further improper use in derogation of citizens' constitutional rights; and to rectify the federal courts' abdication of responsibility independently to examine and analyze claims presented on habeas corpus.

Introduction

The Fifth Amendment prohibition against double jeopardy applies to the States through the due process clause of the Fourteenth Amendment. *Benton* v. *Maryland,* 395 U.S. 784, 23 L.Ed.2d 707 (1969).

In addition to the traditional notions of what a double jeopardy defense entails, a discrete consideration is "whether the accused has twice been put to trial."

Pettyjohn v. *Evatt,* 369 F.Supp. 865 (E.D. Tenn. 1974), *aff'd without opinion,* 500 F.2d 1403 (6 Cir. 1974). Moreover, the double jeopardy clause includes not only a prohibition against twice prosecuting a person for the same offense, but also proscribes twice prosecuting him on the basis of the same factual contentions, albeit for different crimes. *United States ex rel. Triano* v. *Superior Court of New Jersey,* 393 F.Supp. 1061 (D.N.J. 1975), *aff'd without opinion,* 523 F.2d 1052 (3 Cir. 1975). And, in the words of this Court, one of the interests protected by the double jeopardy clause is "the minimization of harassing exposure to the harrowing experience of a criminal trial . . ." *Crist* v. *Bretz,* 437 U.S. 28, 38, 57 L.Ed.2d 24, 33 (1978).

With these principles in mind, consider the factual situation at bar: Defendants were acquitted of conspiracy and of solicitation on a theory of request, but the jury was unable to agree upon a verdict on the charge of solicitation on an encouragement theory, upon a single set of facts. At the first trial, the jury was not instructed as to the meaning of "encouraging" or "requesting." Both solicitation counts were framed pursuant to an Illinois statute which—despite the Illinois Supreme Court's eventual holding to the contrary—even the prosecution conceded creates and defines but a single offense of solicitation.[3] The statute provides:

> "A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense." Chap. 38, sec. 8-1(a), Ill.Rev.Stat. 1979.

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[3] "The State concedes that there is only one crime of solicitation." *People* v. *Cole,* 91 Ill.2d 172, 435 N.E.2d 490, 491, 61 Ill.Dec. 793, 794 (1982).

Obviously, this statute sets out three alternative theories whereby the same offense can be charged. (See opinion of Illinois Appellate Court so holding, discussed at pp. 10-11, *infra.*)

Acquittal of solicitation by requesting bars re-prosecution for solicitation by encouraging, based on a single incident and identical evidence.

Based on a single incident and an identical set of evidentiary facts,[4] the State chose to charge the single offense of solicitation in two counts, by charging in Count 1 that defendants "requested" the commission of murder, and in Count 2, that they "encouraged" its commission.

Defendants' position hinges on their acquittal on the requesting theory as charged in Count 1, rather than on the mistrial following the jury's failure to reach a verdict on the encouraging theory as charged in Count 2. Since both counts amount to merely different theories of the same offense—and both depended on identical facts—double jeopardy principles mandate that the acquittal on Count 1 operates as a bar to retrial on Count 2 following the mistrial.

The District Court and Court of Appeals adhered to the Illinois Supreme Court's construction of the solicitation statute, under which interpretation, two separate offenses are created. (App. A, pp. 1a-2a) For reasons elucidated

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[4] It is not contested that identical facts were offered in support of both counts at the first trial, and the same facts again were offered in support of Count 2 at the second trial. See Statement of Facts, p. 5, *supra.*

Moreover, as further detailed at pp. 12 & 18, *infra,* at the first trial no instructions were given defining "requesting" or "encouraging."

below, that interpretation is patently unreasonable, on the facts, and therefore should not be followed by the federal courts. Moreover, such adherence, based on *O'Brien* v. *Skinner,* 414 U.S. 524, 531, 38 L.Ed.2d 702, 708 (1974), is not warranted in context, and constitutes an improper application of that decision not contemplated by this Court.

The Illinois Supreme Court's blind adherence to inapplicable language in *Lee* v. *United States,* 432 U.S. 23, 30, 53 L.Ed.2d 80, 87 (1977), that "'A mistrial invariably rests on grounds consistent with re-prosecution,'" *People* v. *Cole, supra,* 435 N.E.2d at 491, 61 Ill.Dec. at 794, fixates only on the mistrial, utterly ignoring the acquittal on the other solicitation (requesting) count, which—on the facts, (and considering the State's concession, though ignored by the Illinois Supreme Court, that the statute charges but a single offense)—should be held to bar retrial on the other (encouraging) solicitation count.

The Appellate Court astutely perceived that on these facts, it is the acquittal on Count 1 (solicitation by requesting), rather than the mistrial following the jury's failure to agree on Count 2 (solicitation by encouraging), that creates the double jeopardy violation upon a second trial on the same facts upon Count 2. The Appellate Court's well-reasoned opinion reversing defendants' convictions, *People* v. *Cole,* 98 Ill.App.3d 309, 424 N.E.2d 393, 53 Ill.Dec. 758 (3 Dist. 1981), properly views the solicitation statute's "commands, requests or encourages" as "three possible descriptions of the same activity [which] do not constitute separate and distinct offenses or crimes when based upon one incident." 424 N.E.2d at 396, 53 Ill. Dec. at 761. Indeed, we commend to Your Honors the concluding paragraphs of the Appellate Court's opinion, *ibid*:

"In summation, we believe that section 8-1(a) of the Criminal Code encompasses one, and only one offense: that of solicitation. By the very terms of the statute, the crime of solicitation can be committed in any one of three ways: by commanding, requesting, or encouraging another to commit an offense. *Those three possible descriptions of the same activity do not constitute separate and distinct offenses or crimes when based upon one incident.* Rather, by our view, the statute offers the State several methods of charging and prosecuting for the same offense. Accordingly, *when the defendants were acquitted of the crime of solicitation under a request theory, the double jeopardy provisions of our federal and state constitutions prohibited their retrial for the same crime under a different theory (encouragement).* The defendants' second solicitation trial was clearly in contravention of the defendants' right to be free from double jeopardy, and as a consequence the convictions which followed that second trial must be reversed.

"For these reasons, we reverse the judgments of the circuit court of Peoria County." (Emphasis added.)

Contextually, "Requesting" and "Encouraging" Are Functionally Equivalent.

The touchstone of this habeas petition is the functional equivalency of the words "requesting" and "encouraging"; and the gravamen of the District Court's order denying habeas relief and of the Seventh Circuit's order affirming, (App. A, p. 1a), is the courts' respective adherence to the Illinois Supreme Court's interpretation of the solicitation statute: that solicitation by encouragement and solicitation by request are not a single offense, and may be separately charged, as separate crimes, in separate counts of an indictment. Each court's determination that it was

bound to follow this interpretation led to its conclusion that defendant's retrial and conviction on Count 2 did not violate the prohibition against double jeopardy. (App. A, p. 2a)

The laudable principle that federal courts do not construe state statutes contrary to the construction of the highest State court, (App. A, p. 2a), must not be deemed controlling here, where such construction is contextually ridiculous and unreasonable. Following that principle here renders the federal court privy to the denial of defendants' federally guaranteed rights.[5]

The lack of any real difference between "requesting" and "encouraging" is highlighted by the trial court's instructions given in the original trial—for the jury was not given definitions of "requesting" or "encouraging." Indeed, the jury was told that defendants were charged with solicitation, not that they were charged with solicitation by any named multiple means. (P. Inst. No. 4, C. 130) While the issues instructions for each of Counts 1 and 2 used the respective terms, "requested" and "encouraged," the instructions contain no definition whatsoever of those words. (See P. Inst. 13-17, C. 139, 142-45.)

Left to their own devices, we can only speculate why the jurors acquitted defendants of solicitation by "requesting" while being unable to agree as to solicitation by "encouraging," for they were given absolutely no guidance as to the meaning of these elemental words. Absent any differential definitions, the ordinary, lay meanings of these words are so congruent that acquittal of solicitation by "requesting" necessarily bars reprosecution of solicitation by "encour-

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[5] This argument is developed *infra*, pp. 13-18.

aging" following the jury's failure to agree on the latter count.

Lest there be any reservations that the alternate theories of solicitation under Illinois law really are just different labels[6] for identical conduct—especially where, as here, identical evidence was presented at both trials—one should simply contemplate the common-usage and dictionary definitions of "requesting" and "encouraging"; they are so similar, contextually, that each overlaps and contains the other.[7] Such shadowy gradations of linguistics must not be construed to uphold defendants' convictions for solicitation by encouraging after they have been acquitted—for the same incident, and upon the same evidence—of solicitation by requesting.

The District Court's and Seventh Circuit's reliance on O'Brien v. Skinner as requiring the federal court to adhere to the Illinois Supreme Court's interpretation of the solicitation statute constitutes improper use of this Court's decision in derogation of citizens' constitutional rights.

O'Brien v. *Skinner,* 414 U.S. 524, 531, 38 L.Ed.2d 702, 708 (1974), neither suggests nor requires that the highest State court's interpretation of a State statute be adhered to by a federal court, where such construction is patently

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[6] " . . . a rose / By any other name . . ." Shakespeare, *Romeo and Juliet,* Act II, scene ii, lines 43-44.

[7] Contextually, the only difference between the two elemental words, requesting and encouraging, is their spelling; no difference, functional or otherwise, was pointed out to the jury. At best, perhaps a "request" should be prefaced with "please"; but on such distinction without a difference, constitutional rights must not be permitted to hinge.

irrational in context, and where it is asserted that such construction results in violation of defendants' federal constitutional guarantee against double jeopardy.

Here, the Seventh Circuit has rubber-stamped the Illinois Supreme Court's construction of the Illinois statute, despite defendants' contention—with which the Illinois Appellate Court agreed—that such construction is unreasonable on the facts and results in violation of defendants' federal constitutional protection against double jeopardy. The Court of Appeals' blind adherence to the Illinois Supreme Court's statutory construction, supposedly mandated by *O'Brien* v. *Skinner*,[8] is not warranted in context, and should be scrutinized by this Court in order to prevent continuing misuse of this decision in derogation of citizens' constitutional rights.

Defendants contended that in the context of this case, where identical evidence was offered as to both counts, and there was no jury instruction defining "encouraging" or "requesting," there is no rational difference between solicitation by encouragement or by requesting, and therefore, that the solicitation statute—at least as applied to

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[8] The Seventh Circuit did not reach the merits of defendants' habeas claim; its decision is completely based on adherence to the Illinois Supreme Court's construction of the Illinois solicitation statute, on the sole basis of *O'Brien* v. *Skinner*:

> "As the Supreme Court said in *O'Brien* v. *Skinner*, . . . 'it is not our function to construe a state statute contrary to the construction given it by the highest court of a State.' Therefore we accept the ruling of the Illinois Supreme Court that solicitation by request and solicitation by encouragement are separate crimes . . ." (App. A, pp. 1a-2a)

their factual situation—creates but a single offense. The Illinois Appellate Court agreed;[9] the Illinois Supreme Court disagreed.[10]

The Seventh Circuit's disposition via resort to the "easy out" of simply adhering to the Illinois Supreme Court's statutory construction, without independent examination, is inherently erroneous under these circumstances, where it is asserted that such statutory construction is irrational and results in a federal constitutional double jeopardy violation. It is essential that the federal habeas court independently assess the constitutional argument, for blind adherence to the single sentence from *O'Brien* v. *Skinner, supra,* reduces the habeas court to a rubber-stamp of the State Supreme Court. Moreover, the principle as stated in *O'Brien* v. *Skinner,* is contextually inapplicable and significantly distinguishable.

In *O'Brien* v. *Skinner, supra,* persons detained in custody awaiting trial, or pursuant to misdemeanor convictions, but not subject to any voting disability under New York law, brought suit in New York State court to vindicate their voting rights, asserting that the State must make some provision for such persons to register and vote. Both the State trial court and intermediate appellate court agreed, construing the applicable State election laws so as to include such incarcerated persons within the category of persons having a "physical disability" from normal voting, so that such persons must be allowed to vote by absentee ballot. 414 U.S. at 527-28, 38 L.Ed.2d at 706. The

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[9] *People* v. *Cole,* 98 Ill.App.3d 309, 424 N.E.2d 393, 53 Ill. Dec. 758 (3 Dist. 1981).

[10] *People* v. *Cole,* 91 Ill.2d 172, 435 N.E.2d 490, 61 Ill.Dec. 793 (1982).

New York Court of Appeals, however, ruled that the election statutes be so construed as not to include such incarcerated persons within the category of persons with a "physical disability" eligible for absentee voting. *Ibid.* Refusing to construe the State election law contrary to the construction given by New York's highest reviewing court, this Court found that such construction violated appellants' rights to the equal protection of the laws guaranteed by the Fourteenth Amendment, and, accordingly, reversed and remanded for vindication of appellants' voting rights. *Id.* at 531, 38 L.Ed.2d at 708.

Significantly, it was not argued in that case—as it was at bar—that the highest State court's construction of the statute is patently unreasonable and irrational, in context. Nor was it argued—as here—that such construction itself results in violation of defendants' constitutional rights.

In *O'Brien* v. *Skinner, supra,* this Court adhered to the New York Court of Appeals' construction of the New York voting statute, finding that such construction violated appellants' federally guaranteed constitutional rights. The only way this Court could have found no federal constitutional violation would have been to construe the statute differently than as construed by the highest State court. Both in that decision and in *Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 837, 56 L.Ed.2d 1, 9, n.9 (1978)—both of which cases were relied on by the District Court in support of its decision to adhere to the Illinois Supreme Court's construction of the solicitation statute, which ruling the panel affirmed, citing only *O'Brien* v. *Skinner, supra,* (App. A, p. 1a)—the statutory interpretation given by the respective highest State courts resulted in this Court finding a federal constitutional violation

which, in each instance, the Court vindicated by appropriate action. In each case, the federal constitutional violation might have been avoided by adopting a different statutory interpretation; and this Court refused to negative the violation by construing the statute differently than the highest State court already had. This is entirely different from the situation here, where defendants maintain in the federal proceedings that the State court's interpretation is unreasonable, resulting in denial of their federal constitutional rights.

The contextual unreasonableness of the Illinois Supreme Court's position that solicitation by requesting and solicitation by encouraging are not the same offense—though based on a single incident, though the same evidence was offered in support of both counts at the first trial and in support of Count 2 at the second trial, and though the jury at the first trial was not instructed on any definitions of "encouraging" or "requesting"—should free the federal court from any strictures that might otherwise require adherence to the State court's interpretation of the statute. The Seventh Circuit's holding, affirming dismissal of the habeas petition, renders the federal courts privy to the perpetuation of the denial of defendants' right not to be put twice in jeopardy for the same offense.

Where the State court's interpretation of State law deprives a defendant of federally guaranteed constitutional rights, the federal court has both the power and the duty to determine whether such interpretation is reasonable. The federal court is not bound to follow a State court's interpretation of State law where it appears the State-law holding was engendered by a desire to rule against the

federally-based constitutional claim. *Cf. NAACP* v. *Alabama,* 357 U.S. 449, 1 L.Ed.2d 1488 (1958). Here, the Illinois Appellate Court agreed that the solicitation statute creates but a single offense, and the Illinois Supreme Court's holding that it does not—necessary to rule against defendants' double jeopardy claim at bar—is not supported by any precedent or even any examples of factual situations wherein solicitation by requesting and solicitation by encouraging, based on identical facts, could possibly charge more than one offense. The absence of any jury instructions on any difference between the two words—indeed, neither word (requesting or encouraging) was defined for the jury—is persuasive that there is but a single offense created by the statute, at least upon these facts.

In this factual context, the holding that solicitation by encouraging is an offense separate and distinct from solicitation by requesting, is irrational and unreasonable; for this is truly a distinction without a difference, where the very same facts were adduced in support of both counts at the first trial, and the identical facts again were adduced at the second trial on count 2. This Court should not permit this result to be reached on the sole basis of its decision in *O'Brien* v. *Skinner, supra.* Certiorari should therefore be allowed.

Policy Considerations

The two basic purposes of the double jeopardy clause are protection against double punishment for a single offense, and prevention of successive prosecutions for the same alleged offense. (See citations at pp. 7-8, *supra.*) This case involves the latter purpose, challenging trial and conviction on one theory following acquittal for the same offense upon a fragmented additional count charging the

same offense via a different theory.[11] The constitutional prohibition against twice being placed in jeopardy for the same offense reflects the Framers' appreciation of the potential for oppression when the prosecution is allowed successive attempts to prove the commission of the same crime.

When a jury concludes that the State has failed to prove its case, so that the defendant must be acquitted in accordance with the presumption of innocence, conceivably the prosecution might be able to gather additional evidence and prove the crime at a later time. Although the People have an interest in bringing to justice and punishing the guilty, the double jeopardy clause declares that such governmental interest is outweighed by the potential that successive prosecutions may be used to inflict vexation and harassment.

Indeed, the instant case differs only in degree from the above situation involving a prior acquittal, after which a second trial is had for the same offense. Here, only semantics and rhetoric differentiate between solicitation by requesting and solicitation by encouraging. Had the State

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[11] While the Seventh Circuit did not reach the merits of the petition, it stated that defendants' rights against double jeopardy were not violated by their retrial on the count as to which there was a mistral. (App. A, p. 2a) But this does not deal with the merits of the issue presented by the petition—that is, that their protection against double jeopardy was violated by retrial on that count, not because of the previous mistrial on that count, but because that count charged an offense identical to that as to which they were *acquitted* at the first trial. It is the prior acquittal, not the prior mistrial, which defendants claim bars their present convictions on double jeopardy grounds —and the Seventh Circuit did not reach the merits of this seminal issue.

chosen to charge both theories of this single offense in a single count, rather than in two counts, could it seriously be argued that following acquittal of this count, the State could again try defendants for solicitation upon the same set of facts? It is unconscionable that the prosecution's decision to fracture the statute and fragment the counts should result in the identical conclusion upon slightly different paperwork.

To be accused of crime and subjected to trial is a devastating ordeal. Even where the accused eventually is acquitted, the burdens of the experience may, and often do, involve severe embarrassment, psychological damage, and financial ruin. Therefore, the double jeopardy clause demands that the prosecution be allowed only one opportunity to prove a single criminal accusation.

Accordingly, the double jeopardy clause goes further than other constitutional rights respecting the fairness of the conduct of criminal trials; it recognizes the limits the power of government even to *accuse* one of crime.

One of the most awesome powers exercised by government is the power of prosecutors and grand juries to institute criminal proceedings. The exercise of such authority sets in motion the machinery of the criminal justice system and brings the prosecutorial resources of the State to bear upon an individual. The constitutional prohibition against double jeopardy—which bars the State from a second or successive opportunity to prove the commission of a given crime—must therefore be held to extend to situations such as that presented at bar, requiring that when accusatory pleadings are drafted, fragmenting a single offense into separate counts for each possible theory of prosecution, the prosecution is at its peril that the defen-

dant will be acquitted on any one of the counts, forever barring subsequent prosecution on any other count(s) charging the same offense on the same facts, albeit on a different theory. Indeed, otherwise, what is there to prevent the State from electing, in the instant case, for example, to proceed first on Count 1 (solicitation by requesting), and, after acquittal, proceeding on Count 2 (solicitation by encouraging)?

If the proof at trial fails to sustain the allegations—as was obviously the situation here with respect to Count 1—retrial should no more be permitted on the basis that the same offense, upon the same set of facts, was committed on an alternate theory, than on the basis of augmented proof, which clearly is constitutionally forbidden.

* * *

The Illinois Supreme Court's decision is not the culmination of a line of cases finding separate offenses defined by and chargeable under the solicitation statute; rather, it is a *sui generis* decision, tailored to rationalize affirmance of defendants' convictions. As such, and for all the reasons above set forth, the decision is not entitled to the federal court's deference.

By adhering to the Illinois Supreme Court's irrational construction of the statute in this case, the District Court and the Seventh Circuit (App. A, p. 1a) have abdicated their respective responsibilities, as federal courts sitting as arbiter of habeas petitions, to protect United States citizens against encroachment of their federally guaranteed constitutional rights by the States. Casual citation of a single sentence out of context from *O'Brien* v. *Skinner, supra,* provides no easy answer; the merits of the petition should have been, but were not, reached.

Accordingly, certiorari should be allowed—not only to vindicate defendants' rights to be free from double jeopardy in the instant case, but also to clarify the implications of *O'Brien* v. *Skinner, supra,* in order to prevent that decision's further improper use in derogation of citizens' constitutional rights, and to rectify the federal courts' abdication of responsibility independently to examine and analyze claims presented on habeas corpus.

CONCLUSION

For any or all of the foregoing reasons, certiorari should be allowed. And, on the merits, the Court of Appeals' order affirming the District Court's order denying habeas relief should be reversed, and the cause remanded with directions to issue the writ.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued June 7, 1984)

May 23, 1985.

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Edward Dumbauld, Senior District Judge *

U.S. ex rel. JAMES D. COLE, SR.,
and JAMES D. COLE, JR.,

Petitioners-Appellants

No. 83-3187 vs.

STEVEN McEVERS, Warden, Illinois
Correctional Center, Lincoln, Illinois,

Respondent-Appellee

Appeal from the United States District Court for the
Central District of Illinois, Danville Division
No. 83 C 1114
Hon. HAROLD A. BAKER, *Judge*

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* Honorable Edward Dumbauld, Senior Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

ORDER

In this habeas corpus case appellants attack on double jeopardy grounds their conviction of solicitation to commit murder. They were indicted in three counts for violation of c. 38, sec. 8-1(a) of Ill.Rev.Stat. (1979) which provides that "A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense."

Count I alleged solicitation by requesting. Count II alleged solicitation by encouraging. Count III alleged conspiracy. Appellants were acquitted on Counts I and III. The jury were unable to agree and a mistrial ordered with respect to Count II. On retrial appellants were convicted and their convictions upheld by the Supreme Court of Illinois on April 16, 1982. Certorari was denied by the United States Supreme Court on October 4, 1982. In a habeas corpus proceeding the District Court granted summary judgment in favor of appellee on October 27, 1983.

The District Court correctly concluded that federal courts follow the construction of a State statute adopted by the highest court of the State. As the Supreme Court said in *O'Brien* v. *Skinner,* 414 U.S. 524, 531 (1974), "it is not our function to construe a state statute contrary to the construction given it by the highest court of a State". Therefore we accept the ruling of the Illinois Supreme Court that solicitation by request and solicitation by encouragement are separate crimes and may be charged in separate counts of an indictment. *People* v. *Cole,* 435 N.E. 2d. 490, 492 (1980). Hence the rule applies that a retrial on the count as to which there was a mistrial does not constitute double jeopardy. *Illinois* v. *Somerville,* 410 U.S. 458, 463 (1973).

The evidence at the trial supports the convictions for solicitation by encouragement.

An undercover agent arranged to meet with appellants, who took him to see the home of the intended victim, agreed upon a price of $1500, and paid a deposit of $200. This "contract" certainly constituted (in appellants' minds at least) what was intended as an economic incentive for the agent to murder the victim. Providing such an incentive clearly amounted to "encouraging" commission of the murder. The fact that the offense was never carried out, but the appellants were arrested instead, does not mitigate or dissipate their criminal intent or the nature of their act as a species of solicitation to procure commission of the offense.

For the foregoing reasons the judgment of the District Court is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 5, 1985.

Before

Hon. John L. Coffey, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Edward Dumbauld, Senior District Judge *

U.S. ex rel. JAMES D. COLE, SR.,
and JAMES D. COLE, JR.,
Petitioners-Appellants

No. 83-3187 vs.

STEVEN McEVERS, Warden, Illinois
Correctional Center, Lincoln, Illinois,
Respondent-Appellee

Appeal from the United States District Court for the
Central District of Illinois, Danville Division
No. 83 C 1114
Hon. HAROLD A. BAKER, *Judge*

On consideration of the petitions for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by petitioners-appellants, all of the judges on the panel having voted to deny the petition for rehearing and no active judge of the court having called for a vote on the suggestion of rehearing *en banc*

IT IS ORDERED that the petitions for rehearing and suggestion that it be reheard *en banc* be, and the same is hereby, DENIED.

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* Honorable Edward Dumbauld, Senior Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.